

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TREEHOUSE AVATAR LLC,

Plaintiff,

v.

VALVE CORPORATION,

Defendant.

CASE NO. C17-1860-RAJ

ORDER

This matter comes before the Court on Defendant Valve Corporation's ("Valve") Motion for a More Definite Disclosure of Asserted Claims and Infringement Contentions ("Motion"). Dkt. # 131. Plaintiff Treehouse Avatar LLC ("Treehouse") opposes Valve's Motion, and Valve has filed a Reply. Dkt. ## 136, 137. For the reasons stated below, the Court **GRANTS** Valve's Motion.

I. BACKGROUND

On May 27, 2015, Plaintiff Treehouse, a Delaware corporation headquartered in Ottawa, Canada, filed the present patent infringement action against Valve in Delaware, alleging infringement of U.S. Patent No. 8,180,858 ("the '858 Patent"). Dkt. # 1. Defendant Valve is a Washington corporation headquartered in Bellevue, Washington.

1 *Id.* at ¶ 3. Valve produces and markets video games including “Team Fortress 2,” “Dota
2 2,” and “Portal 2,” among others. *Id.* at ¶ 13.

3 The ‘858 Patent, entitled “Method And System For Presenting Data Over A
4 Network Based On Network User Choices And Collecting Real-Time Data Related To
5 Said Choices,” was issued on May 15, 2012 to Treehouse as the assignee of inventors Ian
6 N. Robb, Michael B. Madlener, and Ken J. McGuire. Dkt. # 1-1. The ‘858 Patent is
7 directed to methods of collecting data from an information network in response to user
8 choices of a plurality of users navigating character-enabled (“CE”) network sites on the
9 network. *Id.* at 2. For example, in networked video games used through a web browser
10 or computer application accessing a server through the internet, users may select
11 characters and character attributes from data presented to the users in one embodiment.
12 *Id.* at 20-21.

13 After multiple revisions over the course of litigation, Treehouse narrowed its
14 infringement theories to two games: Dota 2 and Team Fortress 2. Dkt. # 132, Exs. A, B.
15 Treehouse’s experts reviewed the source code for Dota 2 and Team Fortress 2 from
16 November 14, 2016 to November 10, 2017, totaling 141 hours over eighteen (18) days.
17 *Id.* at ¶ 2. In December 2017, the District of Delaware transferred the case to this
18 District. Dkt. # 116. Treehouse served its infringement contentions for Dota 2 and Team
19 Fortress 2 on April 27, 2018. Dkt. # 132 at ¶¶ 4-5. Valve served its non-infringement
20 contentions on June 8, 2018. *Id.* at ¶¶ 6-7.

21 **II. DISCUSSION**

22 Western District of Washington Local Patent Rule 120 requires a party claiming
23 patent infringement to serve on all parties a disclosure of asserted claims and
24 infringement contentions. Pursuant to Local Patent Rule 120, the infringement
25 contentions must contain (a) each claim of each patent that is allegedly infringed by each
26 party; (b) each accused apparatus, product, device, process, method, act, or other
27 instrumentality for each asserted claim; (c) a chart identifying specifically where each

1 element of each asserted claim is located within each accused instrumentality; (d) for
2 indirect infringement, a description of the acts of the alleged indirect infringer that
3 induced the direct infringement by a third party; (e) whether each limitation of each
4 asserted claim is alleged to be literally present or present under the doctrine of
5 equivalents in the accused instrumentality; and (f) the priority date to which each asserted
6 claim allegedly is entitled, if applicable. *See* W.D. Wash. Local Patent Rule 120. Local
7 Patent Rule 124 provides that amendment of infringement contentions may be made only
8 by order of the Court upon a timely showing of good cause. W.D. Wash. Local Patent
9 Rule 124. One example of “good cause” is “recent discovery of nonpublic information
10 about the Accused Device which was not discovered, despite diligent efforts, before the
11 service of the Infringement Contentions.” *Id.*

12 Valve argues that Treehouse’s infringement contentions fail to conform with the
13 specificity requirements of the Local Patent Rules, primarily because they do not include
14 pinpoint citations to the source code of the accused instrumentalities. Dkt. # 131 at 5.
15 Other jurisdictions, such as the Northern District of California, Central District of
16 California, and Eastern District of Texas, generally hold that in software cases, once
17 source code has been provided to plaintiffs, they must supplement their infringement
18 contentions with pinpoint source code citations. *See, e.g., Finjan, Inc. v. Sophos, Inc.*,
19 14-CV-01197-WHO, 2015 WL 5012679, at *3 (N.D. Cal. Aug. 24, 2015) (granting
20 motion to compel patentee to amend its infringement contentions and to provide pinpoint
21 source code citations for its infringement contentions after the accused infringer
22 supplemented its source code production); *Vasudevan Software, Inc. v. Int’l Bus.*
23 *Machines Corp.*, No. C09-05897 RS HRL, 2011 WL 940263, at *7 (N.D. Cal. Feb. 18,
24 2011) (collecting and following cases in N.D. Cal., and other courts, that require pinpoint
25 citations in software patent infringement actions after the source code has been provided
26 to the plaintiff); *see also Kinglite Holdings Inc. v. Micro-Star Int’l Co. Ltd.*,
27 CV1403009JVSPJWX, 2016 WL 6762573, at *2 (C.D. Cal. June 15, 2016) (ordering

1 patentee to serve amended infringement contentions that included pinpoint cites to the
2 accused infringer's source code); *Zix Corp. v. Echoworx Corp.*, 2:15-CV-1272-JRG,
3 2016 WL 3410367, at *2 (E.D. Tex. May 13, 2016) (after accused infringer had produced
4 its source code, striking patentee's amended infringement contentions for not providing
5 identification of the specific source code of the accused product and ordering amended
6 infringement contentions); *Big Baboon Corp. v. Dell, Inc.*, 723 F. Supp. 2d 1224, 1227–
7 28 (C.D. Cal. 2010) (collecting cases holding the same).

8 The only applicable case from this District that either party cites is *REC Software*
9 *USA, Inc. v. Bamboo Sols. Corp.*, No. C11-0554JLR, 2012 WL 3527891, at *2 (W.D.
10 Wash. Aug. 15, 2012), where this issue was one of first impression in this District. *REC*
11 *Software USA, Inc. v. Bamboo Sols. Corp.*, C11-0554JLR, 2012 WL 3545056 (W.D.
12 Wash. Aug. 16, 2012). In *REC Software*, which also involved a patent with method
13 claims applied to software, Judge Robart explicitly adopted the Northern District of
14 California rule that “plaintiff’s infringement contentions should provide pinpoint citations
15 to specific portions of computer code once a plaintiff has had a sufficient opportunity to
16 review the source code.” *REC Software*, 2012 WL 3545056, at *3.

17 In its Response, Treehouse first contests the “software nature” of this case, arguing
18 that “wording of the patent claims drives the nature of the evidence that can or must
19 prove infringement.” Dkt. # 138 at 2. The Court disagrees. As Treehouse admits, “this
20 case is about two computer games.” *Id.* How these video games operate on the software
21 level is the focal point of the infringement analysis. Treehouse cites no authority for its
22 position that the terms of the patent itself, in isolation, determine whether the case is of a
23 “software nature.” As Valve notes, the asserted claims of the ‘858 Patent are directed at
24 functionalities that operate through computer programs. Dkt. # 140 at 3. This case is
25 undoubtedly of a “software nature.”

26 Treehouse next argues there is no rule requiring source code citations in
27 infringement contentions. Dkt. # 138 at 6-7. The Court disagrees, as Treehouse provides

1 no Ninth Circuit or Federal Circuit authority to dispel the rule set forth in *REC Software*.¹
2 The Court notes, however, that there is at least one decision from the Northern District of
3 California holding that precise pinpoint source code citations may not be required in all
4 cases, so long as the infringement contentions adequately identify their theory of
5 infringement by other means. *See, e.g., Finjan, Inc. v. Proofpoint, Inc.*, 13-CV-05808-
6 HSG, 2015 WL 9023166, at *2-*3 (N.D. Cal. Dec. 16, 2015) (declining to compel
7 patentee to provide pinpoint source code citations because infringement contentions
8 included screenshots, references, and source code directories for each accused
9 instrumentality). The Court does not necessarily reject this approach, but believes that
10 more specificity is necessary in this case. Although some parts of Treehouse's
11 infringement contentions for Dota 2 cite to API documentation and some apparent source
12 code files (*see, e.g.,* Dkt. # 137-1 at 8-10, 26-27), this practice is not uniform. In its
13 Motion, Valve provides examples of some areas where Treehouse's infringement
14 contentions, as they currently stand, do not provide the requisite specificity. Dkt. # 131
15 at 6-13. For instance, Treehouse's infringement contentions contain multiple references
16 to IP addresses and screenshots of servers it claims to be CE network sites, but fails to
17 identify definitively what these sites are, where these sites are located, and what specific
18 operations of the accused software utilize these sites. Dkt. # 137, Ex. A at 2; Ex. B at 1-
19 5, 15, 18. Moreover, although Treehouse purportedly identifies a "database" in its Dota 2
20 infringement contentions, it does not show or indicate where in the actual accused

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23 ¹ The only authority Treehouse cites for this proposition, *Stratasys, Inc. v. Microboards Tech.*
24 *LLC*, 13-CV-3228 DWF/TNL, 2015 WL 3869672, at *2 (D. Minn. June 23, 2015), is
25 distinguishable from *REC Software* and the Northern District of California rule Judge Robart
26 adopted. First, that case was not in this District nor in the Northern District of California, where
27 the local patent rules serve as the model for this District. Second, that case involved a H-Series
3D Printer, a product distinct from the wholly software nature of the accused products in the
present case. *Stratasys*, 2015 WL 3869672 at *2. The Court finds *REC Software* to be the more
applicable authority in this matter.

1 products this database exists; instead, Treehouse either cites to internal wiki documents
2 of early versions of what these databases *might* be, or in the case of Team Fortress 2, fail
3 to specifically identify the databases at all. *See, e.g.*, Dkt. # 137, Ex. A at 8-9, 14, 16, 22,
4 23, 39, 42, 62, 63, 65, 70; Ex. B at 5, 10-12, 15, 18.

5 After having access to Valve's source code for each accused product, Treehouse's
6 general references to preliminary documents are insufficient to identify operations in the
7 accused products as they actually exist. While Treehouse's infringement contentions do
8 contain descriptions, references, and screenshots of Valve's accused instrumentalities,
9 merely "parroting claim language or referencing screenshots and/or website content" is
10 generally not enough to satisfy the specificity requirement of the Local Patent Rules.
11 *Sophos*, 2015 WL 1517920 at *6. And although Treehouse provided source code
12 citations for some elements, compared to the plaintiff in *Proofpoint*, who at least
13 referenced source code directories for *all* asserted claim elements, Treehouse's
14 infringement contentions fall short. *Proofpoint*, 2015 WL 9023166 at *3. For those that
15 remain, Treehouse's citations to general system descriptions of, for instance, the Steam
16 Economy based on information from wikis do not definitively show where in the actual
17 accused products the infringing instrumentalities are located. Software cases, like this
18 one, require more specificity than arguing infringement by implication.

19 Treehouse's remaining arguments against requiring source code citations are
20 unavailing. Treehouse's contention that Valve's objections were untimely is more finger-
21 pointing than viable argument, and Treehouse cites no authority that would require Valve
22 to respond sooner than it did. Dkt. # 138 at 4-5. Treehouse argues that Valve's invalidity
23 contentions also do not contain pinpoint source code citations, but this argument is a non-
24 sequitur; Treehouse cites no authority requiring such citations, and even if they did, this
25 would not cure Treehouse's own failure to provide such citations. *Id.* at 11. Finally,
26 Treehouse's argument that Valve has not suffered prejudice is unconvincing. *Id.* at 11-
27 13. The specificity of Treehouse's infringement contentions necessarily affects Valve's

1 ability to craft effective non-infringement contentions, which Valve cannot do so long as
2 Treehouse's infringement contentions lie in a realm of uncertainty.

3 Ultimately, the Court finds that because this case involves a patent applied to
4 computer software, and Treehouse has had access to that software's source code for
5 nearly a year, the *REC Software* approach should apply. Providing citations to the
6 relevant source code locations would, in this Court's view, help ameliorate Valve's stated
7 concerns, and bring Treehouse's infringement contentions in line with Local Patent Rule
8 120. Some of Treehouse's contentions appear to already contain references to relevant
9 code or API documentation files, but this practice must apply to each claim limitation.

10 Accordingly, the Court will **GRANT** Valve's Motion. Treehouse shall serve
11 amended infringement contentions containing source code citations complying with
12 Local Patent Rule 120 and the rule set forth in *REC Software USA, Inc. v. Bamboo Sols.*
13 *Corp.*, No. C11-0554JLR, 2012 WL 3527891 (W.D. Wash. Aug. 15, 2012) **no later than**
14 **twenty-one (21) days from the date of this Order.** Valve is granted leave to serve
15 amended non-infringement and invalidity contentions **no later than twenty-one (21)**
16 **days from the date Treehouse serves its amended infringement contentions.** In
17 facilitating the service of Treehouse's amended contentions, the Court expects the parties
18 to be civil and cooperate in the sharing of necessary information. For instance, to the
19 extent Treehouse may need to review or re-review Valve's source code to amend its
20 contentions to the specificity Valve requests, the Court expects Valve to promptly make
21 this information available to Treehouse, so it may complete its amended contentions by
22 the deadline. Failure to act in accordance with this directive will only further delay the
23 resolution in this case and may result in sanctions.

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Dated this 25th day of February, 2019.

The Honorable Richard A. Jones
United States District Judge